EDITOR'S NOTE

ORIGINAL PAGINATION NOT CONTINUOUS

Supreme Court, U.S.
FILED

02 1670 FEB 24 2003

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

BEVERLY B. MANN,

Petitioner,

v.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Beverly B. Mann
Petitioner *Pro Se*
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QUESTIONS PRESENTED

1. Did the Court of Appeals err in interpreting this Court's holding in *BE&K Construction Co. v. NLRB*, 122 S. Ct. 2390 [2002), as extending the First Amendment protections delineated in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, only to fee-shifting sanctions imposed by regulatory agencies and not to fee-shifting sanctions imposed by Article III courts [in the instance pertinent here, a fee-shifting sanction citing 28 U.S.C. § 1927, imposed *sua sponte* and *ex parte* by the federal appeals court that issued the holding which this petition seeks review)? Stated otherwise, does the First Amendment's "right to petition" clause bar the imposition of (and the loose implicit possibility of the imposition of) a fee-shifting sanction by an Article III court for the filing of an objectively *non*baseless lawsuit that, unlike the one in *PREI*, is not an antitrust action, and if so does the "right to petition" clause preclude such sanction absent a threshold due process inquiry into *whether* the lawsuit at issue indeed is objectively baseless?

2. Did the Court of Appeals err in defining as an executable "judgment" (with the legal implications attendant to judgments) a fee-shifting sanction issued *sua sponte* and *ex parte* by a federal appeals court, notwithstanding that the imposition of the sanction resolved no dispute whatsoever between the litigants and that it was imposed for separate litigation never pending in that court, in which the designated recipient of the sanction fee was not a party, and that the conduct sanctioned was alleged and found wrongful only by the sanctioning court absent any procedural due process (literally, a process conducted entirely in absentia)? The legal implications at issue here are: (1) the disbarment by that court of the attorney sanctioned, in the face of her refusal to pay the sanction; and (2) the attempt by the beneficiary of the sanction order (Cook County, Illinois) to execute that sanction order as a monetary judgment in a state-court execution-of-judgment proceeding.

3. May a sanctions order issued by an appellate court *sua sponte* and *ex parte*, imposed for alleged conduct in separate litigation never pending in that court, be challenged collaterally as void – as in *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957), in a non-sanctions context – for lack of personal jurisdiction by that court over the litigant or the attorney sanctioned, irrespective that the sanctions order was issued under the caption of a case that *was* before that court? Phrased otherwise, does the collateral-bar rule cited in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), upon which the Court of Appeals relies, apply even when, unlike in *Spangler*, the order was entered not in resolution of issues that were orderly litigated (or litigated at all) but instead *sua sponte* and *ex parte*, and when, also unlike in *Spangler* (which concerned a continuing injunction), there is *no mechanism* by which the *ex parte* order can later be challenged?

4. Did the Court of Appeals err in holding that the right to petition an appellate court for discretionary reconsideration of a judgment or permanent order issued by that court *sua sponte* and *ex parte*, coupled with the right to petition this Court for writ of certiorari, *alone* satisfies the Fifth Amendment's procedural due process guarantee, irrespective that unlike temporary restraining orders or preliminary injunctions, the *ex parte* order is permanent, and irrespective that there existed no emergency that compelled that the ruling be made *ex parte*?

5. Did the Court of Appeals err in holding that Federal Rule of Appellate Procedure 46(b)(1)(B), which that court itself describes in its opinion as establishing "an open-ended standard of lawyers' deportment rather than a list of disciplinary rules, as all states and many district courts have done," is not unconstitutionally vague, either generally or as applied to the petitioner?

6. Does an order barring (perhaps permanently) an individual from access to all federal courts within the

federal circuit in which she resides – including a bar even to the filing of a petition to vacate that very order in light of new authority of this Court, and including (in this instance) a bar to the filing of a motion to that court requesting clarification of whether it retained jurisdiction over the sanction order described above (thus eliminating state-court jurisdiction in an execution-of-judgment suit) – violate the First Amendment's right-to-petition clause as interpreted in *BE&K Construction Co. v. NLRB*, and the First Amendment's free speech clause?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Seventh Circuit were as follows:

Appellant: Beverly B. Mann

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Illinois Supreme Court Rule 381(a)

CONSTITUTIONAL, STATUTORY AND PROCEDURAL-RULE PROVISIONS AT ISSUE

1. United States Constitution, Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3. United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5. Counsel's Liability for Excessive Costs, 28 U.S.C. § 1927:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

6. State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit, 28 U.S.C. § 1738:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be Authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

7. Tax Injunction Act, Taxes by States, 28 U.S.C. § 1341:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

8. Federal Rule of Appellate Procedure 46(b)(1)(B)

Federal Rule of Appellate Procedure 46:

RULE 46. Attorneys

(b) Suspension or Disbarment.

(1) *Standard.* A member of the court's bar is subject to suspension or disbarment by the court if the member:

(B) is guilty of conduct unbecoming a member of the court's bar.

9. Federal Rule of Civil Procedure 65(a)(1) and (b)(1)

(a) PRELIMINARY INJUNCTION.

(1) *Notice*. No preliminary injunction shall be issued without notice to the adverse party....
(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION.
A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if
(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary

restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

10. Reversal or Dismissal, 735 ILCS § 5/13-217:

In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District Court for improper venue, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff, or after the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District Court for improper venue.

11. Fees-Counties of 3,000,000 or More, 705 ILCS §105/27.2a(k):

§ 27.2a. The fees of the clerks of the circuit court in all counties having a population of 3,000,000 or more inhabitants in the instances described in this Section shall be as provided

in this Section. The fees shall be paid in advance and shall be as follows:

(k) Certification, Authentication, and Reproduction.

(2) Court appeals when original documents are forwarded, under 100 pages, plus delivery and costs; $75.
(3) Court appeals when original documents are forwarded, over 100 pages, plus delivery and costs, $150.
(4) Court appeals when original documents are forwarded, over 200 pages, an additional fee of 25 cents per page.

12. Contents of the Record on Appeal, Illinois Supreme Court Rule 321:

The record on appeal shall consist of the judgment appealed from, the notice of appeal, and the entire original common law record, unless the parties stipulate for, or the trial court, after notice and hearing, or the reviewing court, orders less. The common law record includes every document filed and judgment and order entered in the cause and any documentary exhibits offered and filed by any party. Upon motion the reviewing court may order that other exhibits be included in the record. The record on appeal shall also include any report of proceedings prepared in accordance with Rule 323. There is no distinction between the common law record and the report of proceedings for the purpose of determining what is properly before the reviewing court.

13. Illinois Rule of Profession Responsibility 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law. A

lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

CITATION TO PUBLISHED OPINION

This is an attorney disbarment matter initiated on June 18, 2002, by the United States Court of Appeals for the 7th Circuit. (Apps. C and D.) That court on November 1, 2002, issued an opinion in *In the matter of: BEVERLY B. MANN, Respondent*, 311 F.3d 788, 2002 U.S. App. LEXIS 27408, the final sentence which reads: "Beverly Mann is removed from the roll of attorneys authorized to practice in this court." (App. A.) Petitioner timely filed a petition for rehearing, which was denied on November 26, 2002. (App. B.) She submitted a petition for writ of certiorari to this Court postmarked February 24. This Court returned 39 of the copies of the petition, accompanied by a deficiency letter dated March 6 advising her that pursuant to this Court's Rule 14.5 she could submit a petition that complies with Rule 33. (App. A(a) .)

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE[1]

A. Background

This case has been to this Court before, during the 2001-02 term, in an incarnation known then as *Beverly B. Mann v. Dorothy Brown*, as Clerk of the Circuit Court of Cook County, Illinois, and Cook County, Illinois, 2001 U.S. App. LEXIS 19829 (7th Cir. 2001), Nos. 99-1750 & 99-3595, cert. denied, 534 U.S. 1131 (2002), No. 01-856. That lawsuit challenged as violative of the Fourteenth Amendment's equal protection and

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[1] Uncomfortable with the disorienting artifice of referring to herself in the third person, the *pro se* petitioner uses a first-person construction in the remainder of this petition.

due process clauses a subsection of an Illinois statute, 705 ILCS § 105/27.2a(k)(4), that establishes a ceilingless court-clerk's fee of $.25 per page for the preparation of court records for appeal. The fee applies irrespective of the size of the court record or the number of lengthy exhibits (such as deposition transcripts) that appear redundantly in it, and irrespective of the proportion of the record that is relevant to the rulings on appeal. It can total several thousand dollars.

An Illinois Supreme Court Rule, Rule 321, requires that the entire court record be prepared and transferred to the appellate court unless a court order is obtained permitting the severance of the relevant portions of the record from the remainder of it. The fee is paid to the county court clerk's office, which transfers the money into the county's general revenue fund—the fund that pays for the operation of the county government in its various functions, including its prisons, its public hospital and medical clinics, its road maintenance, and its forest preserves. The fund does not, however, pay for the operation of the courts. Because the respective counties' courts throughout Illinois are part of the state court system, the county's general fund pays nothing toward the maintenance of the court systems other than for the cost of running the court clerk's office; Illinois' Constitution provides that the state rather than the county fund the courts.

I am a nonpracticing attorney and was the plaintiff in a pharmaceutical products liability lawsuit litigated in Illinois state court, a case called *Beverly Mann v. The Upjohn Company*, 324 Ill. App. 3d 367 (2001), cert. denied, 122 S. Ct. 2358 (2002), from which *Mann v. Brown* stemmed. In September 1998, my products liability lawsuit was newly pending on cross-appeals in the Illinois Appellate Court, First District. As the appellant-and cross-appellee, I was required to have the court record prepared for appeal and to pay the record-preparation fee, which totaled $1,654.00. I presumed that this fee represented many times the cost to the county of the service for which the fee was being charged, and verified the accuracy of my presumption by obtaining a copy of the collective bargaining agreement that showed the approximate

number of employees of the Cook County Circuit Court Clerk's Office, their hourly rate of pay and the employee benefits they were receiving. I calculated that the per-page fee amounted to several hundred times the actual cost to the county of providing the service.

Illinois Supreme Court Rule 321 permits, upon agreement of the parties or at the judge's discretion, the severance of the portion of the court file pertinent to the issues to be addressed on appeal (in my case, a few hundred pages) so that only that portion will become part of the appellate record and thus will be billed at the per-page rate. I presented a motion under that Rule to the state-court trial-court judge who had last presided in the products-liability. My motion sought, alternatively, a ruling that § 105/27.2a(k)(4) violates the 14th Amendment and a corresponding provision of the Illinois Constitution.

The products-liability defendant objected to Rule 321 document severance, arguing that its appellate counsel would need to review the entire record. The judge denied the motion for document severance, saying that she lacked the authority to grant such a motion, and without argument on the merits of the constitutional challenge declined to exercise jurisdiction over that portion of my motion, saying that the issues it presented were too remote from those in the products-liability case and that in any event there was not an identity of parties or parties-in-interest in the two matters, a requirement for joinder of issues under Illinois law. "File another lawsuit," the judge told me.

As the moving party, I handwrote the order (as is customary in that court), and wrote simply that the motion was denied, a partially imprecise statement although by it I meant that the judge had denied the portion of my motion brought under Rule 321 and had denied my motion to hear the challenge to the constitutionality of § 105/27.2a(k)(4). No court reporter was present at the hearing, but because my motion sought alternatively to challenge the constitutionality of § 105/27.2a(k)(4), I had delivered notice and a copy of my motion to the Office of the Cook County State's Attorney's Civil Division and then phoned that office and requested that

an assistant state's attorney be present at the hearing. The assistant state's attorney who appeared was the one who represented the County throughout the subsequent litigation in federal court—in the district court and on appeal—a fact of significance, as will become apparent below.

I filed another lawsuit as the state-court judge advised, albeit in federal district court. The lawsuit challenged the fee statute as an artificial and potentially steep financial barrier to access to appellate review and as a tax on access to appellate review in violation of the 14th Amendment's equal protection and due process guarantees. It sought, in addition to an ultimate determination of the constitutionality of the fee, a temporary writ of mandamus compelling the Circuit Court Clerk's office to release the already-prepared court record to the appellate court without my prepayment of the remaining fee. (I had paid an initial $75, which was required at the time the record in ordered prepared for appeal.)

At a hearing a few days after I filed the complaint, the district judge dismissed the case. Citing the abstention doctrine under *Younger v. Harris*, 401 U.S. 37 (1971), the judge said I needed to seek a ruling ultimately from the Illinois Supreme Court before I could proceed with the constitutional challenge in federal district court. He also said he thought that, notwithstanding my account of what the state-court judge had said at the hearing—an account that the assistant state's attorney did not dispute, then or ever—the wording of the written, single-sentence state-court order may implicate *Rooker-Feldman* preclusion, a contention I contested. I argued that although the wording of the order was ambiguous, the assistant state's attorney was not contesting my representation of what had transpired at the state-court hearing: that as there had been no argument or discussion at that hearing about the merits of the constitutional claim and that the judge said she was not ruling on the merits but instead was denying my motion to *consider* the merits.

The district judge did not rule on that issue, and instead abstained citing *Younger*. He issued a single-sentence written order saying only that he was dismissing the case for lack of

jurisdiction; he provided no elaboration. I had argued to him that since there was no determination on the merits, there was no preclusion of litigation on the merits—a position that was supported by extensive authority in various federal circuits including the Seventh; in a lengthy concurrence recently, in *ITOFCA, Inc. v. MegaTrans Logistics*, 322 F.3d 928 (Mar. 7, 2003), Judge Kenneth F. Ripple, saying he was writing separately solely to recite settled law on exactly this issue, noted that *res judicata* is determined as a matter of fact based upon the intention of the court that ruled in the earlier matter, and that the party asserting *res judicata* bears the burden of establishing an ambiguously written earlier order *actually* was intended to determine the issue now sought to be precluded, and that due process demands that unresolved ambiguities regarding the intent of the earlier order be resolved *against* preclusion.[2]

I then petitioned, unsuccessfully, for review by the Illinois Supreme Court under Illinois Supreme Court Rule 381, which permits direct petition to that court in certain circumstances, including (explicitly) challenges to the federal or state constitutionality of a state revenue statute. Upon the denial of my petition for review, I presented a motion to the state-court judge who had heard the earlier motion, this motion seeking (in essence) reconsideration of that judge's rulings on the earlier motion. The state-court judge, instead of simply ruling on the motion—which stated simply that the earlier order had denied the earlier motion—said that the earlier order *inaccurately reflected her ruling*. She said she had not *denied* my challenge to the constitutionality of § 105/27.2a(k)(4); she had *declined to hear* my challenge to the

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[2] Citing, e.g, *Kulavic v. Chi. & Illinois Midland Ry. Co.*, 1 F.3d 507, 517 (7th Cir. 1993) (noting that "the burden of establishing preclusion is placed on the party claiming it," *id.* at 517 n.6 (internal quotation marks and citations omitted); also citing *Gleash v. Yuswak*, 308 F.3d 758, 760 (7th Cir. 2002) (noting that claim preclusion is an affirmative defense).

constitutionality of § 105/27.2a(k)(4). She again declined to hear my challenge to the constitutionality of § 105/27.2a(k)(4), saying as she had at the earlier hearing, but this time rather angrily: "File another lawsuit." And this time, she insisted upon dictating the verbatim language of the order so that it would accurately reflect her rulings on *both* motions. That order, dated Nov. 20, 1998, the date of the hearing, read:

> This cause coming on to be heard on plaintiff's Motion for Leave by the Parties to Jointly Remove Most Documents from the Court Record in Order to File Them Independently with the Court of Appeals in Supplement to the Record, or, Alternatively, to Find Unconstitutional Subsection (k) (4) of the Illinois Clerk of Courts Act, 735 ILCS 105/27a (k) (4), it is ordered that:
>
> 1. **The court states that it is reiterating that it is declining to accept jurisdiction to hear the constitutional challenge because the constitutional challenge was not a part of, and is collateral to, the underlying products liability lawsuit.** [My emphasis.]
> 2. The motion to remove documents from the record is denied on the basis that the court lacks the authority to allow it.

The state-court judge thus dictated and signed an order that said in unequivocal language that *her earlier order* was *not* a ruling on the merits of the constitutionality of § 105/27.2a(k)(4). And, significantly for this petition, in doing so she confirmed that *my* earlier account to the federal district judge about what had transpired at the earlier state-court hearing—specifically, that the state-court judge had said at that earlier hearing that she was not ruling on the merits—was dead-on accurate. No court reporter was present at the Nov. 20 hearing, but an assistant Cook County State's Attorney, again upon my written notice and at my oral request, was present and so knew that (as I represented orally and in writing to the district judge and later in my briefs to the federal appellate court) the state-court judge had insisted upon dictating the

verbatim language of the order she signed and entered at the close of that hearing—language whose very purpose was to enunciate that the judge had refused at the earlier hearing to consider (much less to rule on) the merits of my constitutional challenge.

Armed with the superceding (or perhaps just clarifying) Nov. 20, 1998 order of the state-court judge, I filed a motion in federal district court pursuant to Federal Rule of Civil Procedure 60(b) for reinstatement of my federal court lawsuit on the grounds that by respective virtue of my declined petition to the Illinois Supreme Court under Rule 381 and the Nov. 20 state-court order clarifying that there was no ruling on the merits of my constitutional claim, whatever *Younger* or *Rooker-Feldman* obstacles to federal jurisdiction had been removed. The district judge denied the motion, saying that Rule 60(b) relief would be inappropriate because, based upon the wording of the original state-court order and upon my failure before I filed that federal lawsuit to have sought Illinois Supreme Court review, the dismissal of the federal lawsuit was correct at the time it was dismissed.

Thus if I wanted the case heard in federal court, I would have to file a new lawsuit based upon the jurisdictional facts as they existed *then*—just as a plaintiff whose federal diversity-jurisdiction lawsuit was earlier dismissed for lack of complete jurisdiction might be denied Rule 60(b) relief but could refile a still-timely lawsuit in federal district court if, due to changed circumstances, e.g., a slightly altered compilation of parties, diversity indeed exists at the time of the refiling. So I did; I filed another petition for preliminary injunction, and a mandamus complaint challenging the constitutionality of § 105/27.2a(k)(4). The defendants' counsel challenged the refiling, arguing that the district court's jurisdictional dismissal was barred by the doctrine of *res judicata*, an argument premised upon an assertion that jurisdiction was determined as of the date on which I filed my original federal-court complaint rather than as of the date on which I filed the current one. The judge disagreed, ruling that federal jurisdiction was determined as of the date the *current*

lawsuit was filed, a ruling in conformance with this Court's authority as reiterated recently in *Jinks v. Richland County*, 123 S. Ct. ___ (Apr. 22, 2003).

In May 1999, the district judge issued a memorandum opinion denying my petition for preliminary injunction. I filed an appeal, No. 99-1750, pursuant to 28 U.S.C. § 1292(a)(1), which expressly permits appeals from denials of petitions for preliminary injunction. While that appeal was pending, the defendants filed a motion for summary judgment and the district court granted it, issuing a lengthy memorandum opinion holding that § 105/27.2a(k)(4) does not violate the Fourteenth Amendment. I filed an appeal, No. 99-3595, from that as well.

B. The Aug. 31, 2001 Resolution in *Mann v. Brown*

The two appeals in *Mann v. Brown* resulted in three consecutive unpublished orders issued by the Court of Appeals that were the subject of my petition for writ of certiorari in that case. The first of those was a five-page unpublished order issued on August 31, 2001. It is reported at 2001 U.S. App. LEXIS 19829, and was included by the court as Appendix A to the disbarment opinion. That order resolved the appeal based—by the court's own acknowledgment in the order itself—entirely upon affirmative defenses not asserted by the defendants either in the district court or on appeal and in fact not available to the defendants under Illinois law in light of procedural and substantive facts in the case. The order veritably teems with inaccuracies of fact and inaccuracies of Illinois law.

As there was no oral argument in the appeal, my first notice of these affirmative defenses was contained in the order that invoked them as the grounds for the court's ruling.

The affirmative defenses: the abstention doctrine under *Younger* and *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987), and the Tax Injunction Act, 28 U.S.C. § 1341.

Neither defense, though, was available to the defendants in my case, which may be why they had not asserted them.

Illinois Supreme Court authority, specifically *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, N.E.2d 338 (1998), an opinion that the federal appellate court apparently was unaware of but that I was well aware of—it played a role in my underlying products-liability lawsuit and in fact was cited in the appellate opinion in that lawsuit—flatly bars appeals from denials of joinder motion. *Vaughan Oil* says that because it (normally) is far quicker and cheaper to simply file the claim as a separate lawsuit, and because of the likelihood of affirmance on appeal from the denial of joinder in any event, given the deference accorded to the trial judge on such motions, the better course is to file the claim as a separate lawsuit, and so the court eliminated the availability of appeal as an alternative.

Nor, had I had the option to appeal and had I appealed, would I have won. The Illinois Supreme Court, in *River Park, Inc. v. Highland Park*, 184 Ill. 2d 290 (Nov. 19, 1998), formally adopted the "same transaction" test for joinder of claims, and the lower Illinois courts were using that test long before that. Had I appealed from the denial of my joinder motion through the state hierarchy, as the federal appellate court said was my only (long, winding) route to access to eventual court determination on the merits of my claim, I would have found myself on a treadmill. And Illinois had *never required* an appeal as an exhaustion prerequisite to the filing of such a claim as a separate action.

The court was just as profusely inaccurate regarding Illinois law in relation to the Tax Injunction Act, writing that if the charge is a tax "then § 1341 bars any federal interference if a plain and speedy remedy is available in state court. Supreme Court Rule 298 offers one such remedy; asking the state's court of appeals for relief from the charge is another. Mann pursued neither." And with good reason. The remedy that Illinois Supreme Court Rule 298 provides, commonly known as a pauper's petition, was unavailable to me, and Illinois law provides no mechanism by which the courts of appeals can relieve an appellant from the charge. Nor can a federal statute, § 1341 or any other, eliminate the right

to challenge the constitutionality of a statute; it is the Constitution, not 28 U.S.C. § 1983, that creates the constitutional right to challenge the constitutionality of a statute, and § 1341 does not supercede that right. Nor was that the objective of § 1341; the plain-and-speedy-remedy reference is to a plain and speedy mechanism for challenging a statute's constitutionality. Illinois Supreme Court Rule 381 is such a provision, which is why I invoked it. To the extent, if any, that the Tax Injunction Act actually applied in my case, I already had satisfied its mandate by filing my two joinder motions and my Rule 381 petition to the Illinois Supreme Court.

But the court did not mention 28 U.S.C. § 1738, either explicitly or by inference; it did not inquire into the preclusive effect of the state-court order under Illinois law. The court in fact did not even *mention* Illinois law.

It vacated the district court's ruling on the merits and remanded the case to that court with instructions to abstain. But it did not stop with merely invoking *Younger* and *Pennzoil* and the Tax Injunction Act and remanding the case for dismissal on those abstention grounds. Without actually ruling on anything that would have preclusive effect, it tried to effectively bar me from litigating it in state court. The court stated without coherent identity of the basis for it that the case could have been dismissed on *res judicata* grounds, but said that since the defendants had not asserted *res judicata* and instead had argued the appeal only on the merits the court would not decide the case on that basis. The order reads like a Rorschach test; each time I read it, it seems to be basing its *res judicata* advisory conclusion on something other than what I earlier had thought. The court makes wildly baseless statements of fact, such as that the state-court judge determined the merits of the constitutional challenge, and that the district judge concluded—accurately, no less—that I had lied to him about what had transpired at the initial state-court hearing.

And while declining to decide the case on the merits, the court nonetheless opined about them. It pronounced the lawsuit "absurd," an appellation explained by imprecise

derision and this: "[M]uch of Mann's substantive argument is sunk. So far as the federal Constitution is concerned, it makes no difference whether fees go into the state (or county) treasury, which then underwrites the judicial system, or instead are deposited into a separate fund under the control of the courts."

The court was right; it does make no difference. But that's irrelevant because the court's premise of *fact* was patently erroneous. The government that receives the file-preparation fees is *not the same government* that funds the court system. Under the Illinois Constitution's "home rule" provision, taxes and fees collected by the counties, even the fees mandated by state statute, are not passed on to the state. And under another provision of the state Constitution, it is the state rather than the counties that underwrites *in full* the state's court system at all three levels. So while the fee is not a net money-raiser for the state, *is* a net money-maker—a very substantial one, in fact—for the county, given that the county pays *nothing* toward the expenses of running the judicial system other than that it funds the court *clerk's* office. That was the central fact upon which I based my lawsuit, and it permeated my briefs to that court. The appellate court apparently did not know that.

C. The Sanction Order

The Aug. 31 order also pronounced the case "absurdly protracted," a conclusion the court reached by simply tallying the number of initial pleadings I had filed dating back to my complaint in the products-liability lawsuit (a designation that presumably also would apply to legal malpractice lawsuits that allege malpractice in lengthy earlier litigation). Included in the tally were my two state-court joinder motions, the Illinois Supreme Court Rule 381 petition whose purpose was to remove *Younger* comity concerns, my Rule 60(b) motion on my original federal-court petition, and various filings (in addition to the original complaint) in the products-liability case, including my refiling of that lawsuit in state court

pursuant to Illinois statute, that were not even conceivably related to the issue of the constitutionality of §105/27.2a(k)(4) and about which the federal appellate court knew nothing. And of course, primary among the items were my respective appeals from the denial of my petition for temporary injunction and the summary judgment on the merits of my constitutional claim.

The court provided no summary of the facts nor of the nature of the legal grounds I had asserted in the tallied pleadings in any of the cases that were not before that court; it noted only the ultimate instance-specific relief I had sought, a tactic no more justified in those instances than, say, a summary of a habeas petition that says only that the petitioner wants to get out of jail, or a summary of a contract or a personal injury or securities fraud case that says only that the plaintiff wants to be awarded some money.

Stating a belief that under Illinois law I could litigate the matter in state court as long as, but *only* as long as, the underlying products-liability case remained pending on appeal—an incorrect assumption, and one that I don not even understand—and fearing that I would refile it in state court, the court waited fully *eighteen months* after completion of the briefing before submitting the case for decision on August 15, 2001, *one day after* the state appellate court denied my rehearing petition. Then it said although it was not deciding the appeal on the merits, I nonetheless would be unable to litigate the matter in state court because, it claimed, I had waited to file the federal-court action until the state-court appeal in the products-liability case was resolved—suggesting a sonic-speed federal litigation process that took no more than 16 days from the date of filing of the complaint to the date of resolution of the appeal.[3] The order then said:

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[3] "[T]he fact that the appeal in the state case has concluded does not lift the abstention doctrine; one may not avoid a state forum by waiting until its process has concluded. See *Nelson v. Murphy*, 44 F.3d 497 (7th Cir. 1995)."

> These proceedings not only imposed on the federal courts (and the defendants) but also appear to come within the scope of 28 U.S.C. § 1927 ... Mann, an attorney, has multiplied these proceedings unreasonably and, in an objective sense, vexatiously."

Without explanation for why it believed it had jurisdiction over the products-liability lawsuit and over the initial federal petition I had filed challenging § 105/27.2a(k)(4), which I had not appealed, or for that matter over *me* in any matter whatsoever other than the one on appeal there, recited a litany of grievances I did not know it had against me dating back to my filing of the products-liability lawsuit.

Nearly every representation of fact in the litany is verifiably false, some deliberately so, others not. The statements about what transpired in the products liability case were taken loosely from the state appellate court's opinion in the products liability lawsuit. That opinion contained a cascade of outright falsehoods; I had won key trial-court motions that that opinion said I had lost, I was never sanctioned by the trial court (much less barred, as a sanction, from presenting certain evidence), I had had numerous sets of interrogatories and requests for admission stricken and had answered all discovery demands that were not stricken, etc., etc., etc. Nor, as the federal appellate court alleged elsewhere in the Aug. 31 order, did I dismiss the case in federal court in 1992 in order to avoid submitting to discovery; I dismissed it —or more accurately, my attorney at the time dismissed it, before any but a single discovery demand had been made—in order to add as a defendant my diversity-destroying treating physician (whom I had not wanted to sue) and thus return the case to state court, where my attorney and I wanted it litigated and where it was pending before the defendant removed it. Nor had my opponent in that litigation asserted otherwise.

As for why the Illinois Appellate Court so misrepresented the record in the products liability case and addressed inexplicably-fabricated facts that, even if accurate, could not plausibly have been at issue in that appeal, the bottom line is

that it needed a pretext on which to refuse to consider my appeal from certain rulings, including partial summary judgment early in the litigation, and (more significantly and controversially) a procedural policy edict of the then-chief county judge. In a certiorari petition I filed with this Court in that litigation, *Beverly B. Mann v. The Upjohn Co.*, No. 01-1486 (App. K), I detailed the many inaccuracies of fact in the state appellate opinion—inaccuracies picked up in the federal appellate court's Aug. 31 order. That order ended with the following directives:

> We therefore direct Mann to show cause, if any he has, why she should not be ordered "to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." We limit this order to costs and expenses the defendants have incurred in the federal portion of the litigation. Mann may file her response within 14 days. Within the same time, defendants should file with the court an estimate of the total expenses they have incurred in both the district court and this court. This should include an estimate of the market value of the services provided by their in-house legal staffs. See *Central States Pension Fund v. Central Cartage Co.*, 76 F.3d 114 (7th Cir. 1996)....

On September 13, 2001, I filed my response to the federal appellate court's Aug. 31 show-cause order. (App. E.) In 17 single-spaced pages, I responded to each of the court's assertions of fact, of state law, and of federal law—none of which had been asserted by the defendants or by anyone else until the issuance of that order—upon which the court said it based its resolution of the appeal and its show-cause directive. The first six pages refuted, point by point, the factual inaccuracies taken from or inferred from the state appellate opinion in the products-liability case. The 11-page remainder, set out in a separate section, meticulously refuted the court's factual misstatements about Illinois law that I recited above, including discussion of *Vaughan Oil* and of how the Illinois courts are funded and of where the fee I was challenging

actually goes and what it does and does not fund. I said I had been unaware of *Pennzoil* and of the Tax Injunction Act but that neither applied in my case, and as I've done here but in 11 single-spaced pages of detail and argument, explained why.

On Sep. 19, the court issued a two-paragraph order requiring me to pay $5,180.00, the amount stated in the defendants' counsel's statement of costs and "fees," to the Office of the State's Attorney of Cook County. (The court included the Sept. 19, 2001, order in its disbarment opinion as Appendix B.) The order said I had not justified my filings and took the half-sentence in which I said I had been unaware of *Pennzoil* and of the Tax Injunction Act and represented it as the extent of my response to the show-cause order. The order did not acknowledge that I had argued (with elaborate specificity) that under Illinois law neither *Pennzoil* nor the Tax Injunction Act was an available affirmative defense and that the products-liability case and the fee-challenge case were not the same lawsuit.

I did not comply with the order, and on Oct. 16, 2001, citing *Support Systems Int'l v. Mack*, 45 F.3d 185 (7th Cir. 1995), the court barred me from filing any documents of any kind in any federal court within the circuit, unless I am indicted in federal court there, in which event I can defendant myself. I filed a petition for writ of certiorari, *Mann v. Brown*, No. 01-856, cert. denied, 534 U.S. 1131 (2002), seeking review of the Aug. 31, the Sept. 19, and Oct. 16 orders.

D. The Disbarment Matter

On May 29, 2002, the appellate court submitted a five-sentence "charge" letter about me to the Illinois Attorney Registration and Disciplinary Committee. The ARDC dismissed the charge on Sept. 3, finding that I had violated no Illinois rule of professional conduct including Illinois Rule of Professional Responsibility 3.1, titled "Meritorious Claims and Contentions". (Sept. 3, 2002, two- three-sentence letter, which I've misplaced, saying only that the Commission was dismissing the charge.) Meanwhile, on Jun. 18, 2002, the

Court of Appeals initiated its own disbarment proceeding, issuing a one-paragraph show-cause order that I would best describe as generic. (App. C.) I requested clarification, but was told the Oct. 16 "*Mack*" order barred my request, so I filed a response in which I said I was uncertain what the charge(s) were and so was covering all bases I could conceive. On Jul. 8, the court issued a clarification order, which was not clear but which (it turned out) limited the charge to my refusal to pay the sanction. (App. D.) As per that order, I filed a new response. I also requested a Rule 46 hearing, which occurred on Oct. 16. (Tr. at App. F.) I discuss below my written and oral arguments to the court.

On Nov. 1, 2002, the court issued its opinion removing my name from the roll of attorneys authorized to practice before it. (App. A.) I filed a petition for rehearing (en *banc* also), which was denied on Nov. 26. (App. B.) The six Questions Presented in this petition reflect my arguments to that court.

On November 15, 2002, I received a letter from an assistant Cook County State's Attorney notifying me that she had "caused a certified copy of the judgment entered against [me] on September 19, 2001 by the United States Court of Appeals for the Seventh Circuit to be filed with the Office of the Cook County Recorder of Deeds" and that if I did not remit payment within the following 14 days she "will institute legal proceedings against" me. I phoned her and said the order was not a judgment, which I said is a court resolution of a legal controversy between parties and is issued by a finder of fact after due process concerning those issues. I said a sanction order is enforceable only but the sanctioning court, not in a satisfaction-of-judgment proceeding in another court. A few days later, I submitted a motion to the federal appellate court requesting that court to clarify whether it had retained jurisdiction in the sanction matter; I attached a copy of the letter I had received and said I needed to know whether a state court would have jurisdiction in the matter. On Nov. 22, 2002, I received an order from the appellate court clerk's office returning my motion unfiled, citing the Oct. 16, 2001 *Mack*

order. (App. J.) I've heard nothing further about this from the State's Attorney's office.

On Nov. 25, 2002, an article about the disbarment opinion appeared on p. 1 of *The Chicago Daily Law Bulletin*. The article was republished in the Jan. 2003 edition of the *Law Bulletin*'s sister publication, *The Chicago Lawyer*. Since then, in another legal matter in which I'm involved and in the refiled lawsuit in the § 105/27.2a(k)(4) matter, I've received copies of documents field by my opponents essentially adopting the federal court's *ad homonym* verbal assaults, some of them verbatim. In the refiled § 105/27.2a(k)(4) matter, my opponents are asserting as affirmative defenses the doctrines of *res judicata* and (weirdly, in my opinion) law of the case, and are resting those claims upon the statements in the Aug. 31, order. On my rare visits to downtown Chicago, I've run into old acquaintances who ask about what I've now dubbed simply "it," which I recognize will follow me for the rest of my life. And I'm already sick to death of it.

SUMMARY OF ARGUMENT

I argue that the court's opinion treats prejudgment due process as procedurally discretionary on the part of the court and thus renders the Fifth Amendment's due process clause a mere suggestion—fundamentally deviating from (or perhaps altering) normative constitutional jurisprudence. I argue that by treating a sanction as a "judgment" for purposes of its enforcement effect—with all the consequent legal obligations and entitlements that accrue and with the arm of legal sanctions to compel its compliance—while removing procedural due process as a requisite to a judgment, the court profoundly alters the jurisprudential legitimacy of the term "judgment". I argue further that an order entered *sua sponte* and *ex parte*, and without the availability of appellate review of the correctness of the order under the *facts* and *existing* pertinent law (as would be available were it a trial court rather than an appellate court that issued the *sua sponte* order), is *void* or is at the least collaterally challengeable. I argue that a

sua sponte judgment is not a judgment *on a case or controversy before the court*, at least not a case or controversy between the *parties* in that case, and so courts lack Art. III subject matter jurisdiction to issue such orders. Citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), I argue that the entry of such an order is an *ultra vires* act.

I argue also that because three of the four lawsuits on which the sanction order was based were not cases before that court, the court lacked personal jurisdiction over me in three of the four lawsuits in which it collectively sanctioned me under 28 U.S.C. § 1927, and I say that *State Farm Mutual Automobile Ins. v. Campbell*, 123 S. Ct. 1513 (2003), removed any doubt about this that existed when I argued this to the Court of Appeals. And citing *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957), I argue that the order would be void, or at least collaterally challengeable.

I argue also that *State Farm* clarified that punishments assessed by courts in civil matters must comport with substantive due process and cannot be imposed without procedural due process. And I challenge as delusional that the right to file a petition for rehearing and to seek review in this Court combine to satisfy the Fifth Amendment's procedural due process guarantee.

I dispute the Court of Appeals' claim that *BE&K Construction Co. v. NLRB*, 122 S. Ct. 2390 (2002), limits First Amendment right-to-petition considerations to administrative law proceedings and to antitrust matters that are litigated in an Art. III court. I contend that what was at issue in *BE&K* was the circumstances under which the American Rule of fee-shifting can be abrogated. The NLRA Act is silent on that and therefore, *BE&K* says, it is presumed not to abrogate it; thus the First Amendment "objectively baseless" test enunciated in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), is applicable. But neither does the language of 28 U.S.C. § 1927 abrogate the American Rule; to the contrary, that statute limits its authority expressly to unreasonable and vexatious litigation. And I argue that the 7th Circuit Court of Appeals' amorphous definition of the term

"frivolous lawsuit," in my case and in other cases as well, violates the First and Fifth Amendments. I argue, citing *Canatella v. State of California*, 293 F.3d 1099 (9th Cir. 2002), that the unbridled power of an appellate court to sanction attorneys under 28 U.S.C. §1927 absent a clear definition of the type of conduct that is sanctionable, and absent procedural due process and a finding that the litigation at issue was objectively baseless, permits (in essence) judicial censorship of access to the courts and operates as a potential prior restraint that infringes upon the right to petition the government, and that this is especially so in cases such as mine, in which the sanction is for having filed a lawsuit not against a private party but against a government and in which the purpose of the lawsuit is to contest the constitutionality of codified or uncodified government policy.

And citing *BE& K* and *Agostini v. Felton*, 521 U.S. 203 (1997), I ask the court to vacate Oct. 16. 2001, order that bars my access to the federal courts within the 7th Circuit.

I also challenge Federal Rule of Appellate Procedure 46(b)(1)(B) as unconstitutionally vague, and read *Parker v. Levy*, 417 U.S. 733 (1974), upon which the court relied in my case, as the district court in *Spargo v. New York State Commission on Judicial Conduct*, 1:02-CV-1320 NDNY (Feb. 20, 2003) read it.

REASONS WHY THE WRIT SHOULD BE GRANTED

The appellate court has enunciated a rule of law that effectively eliminates procedural due process as a prejudgment requisite and that in practice, at least in most instances, eliminates due process also as a post-judgment corrective. The court's opinion treats prejudgment due process as procedurally discretionary on the part of the court and thus renders the 5th Amendment's due process clause a mere suggestion—fundamentally deviating from (or perhaps altering) normative constitutional jurisprudence.

By treating a sanction as a "judgment" for purposes of its enforcement effect—with all the consequent legal obligations

and entitlements that accrue and with the arm of legal sanctions to compel its compliance—while removing procedural due process as a requisite to a judgment, the court profoundly alters the jurisprudential legitimacy of the term "judgment". It defies reason to hold that although Federal Rule of Civil Procedure 65(b)(1) narrowly circumscribes the conditions under which a *district* court can issue a temporary restraining order *ex parte* and severely limits the length of effect of a TRO absent notice and a meaningful opportunity for hearing, *appellate* courts may, *sua sponte* and subject to no due process constraints whatsoever, issue a *judgment*—an order determining with finality the rights and legal obligations of those who are subject to it. Surely Rule 65(b)(1) has a constitutionally mandated component to it, a component unaffected by any distinction between district and appellate courts.

At the disciplinary hearing on Oct. 16, I challenged Judge Easterbrook's reference to the sanction order as a "judgment". (App. F.) He said that sanctions orders are judgments, even when issued *sua sponte* and *ex parte* by an appellate court. He equated a permanent order issued by an appellate court *ex parte* and *sua sponte*—an order effectively unchallengeable post-entry even via appeal, that compels or bars specific action—with a temporary restraining order. Stunned, I opened my mouth to respond. Apparently recognizing the fault with the analogy, the judge cut me off. Yet the disbarment opinion he wrote, although it does not mention TROs, effectively adopts the analogy and finds such orders unassailable collaterally.

But normally it is procedural due process that *permits* the issuance of a permanent order; that's what makes due process a right, something with genuine value as opposed to a platitude. Judge Easterbrook's opinion holds the reverse, or at least it finds procedural due process irrelevant to the enforceability of a permanent order and to the consequences for refusal to comply with it. I ask this Court to clarify that it is procedural due process that permits the issuance of a permanent order, rather than the reverse. I ask that this Court

clarify that a court's designation of an order as permanent, or as a judgment, does not erase the right to procedural due process as requisite to the issuance of the order. And I ask that this Court hold that an order entered *sua sponte* and *ex parte*, and without the availability of appellate review of the correctness of the order under the *facts* and *existing* pertinent law (as would be available were it a trial court rather than an appellate court that issued the *sua sponte* order), is void or is at the least collaterally challengeable.

Because three of the four lawsuits on which the sanction order was based were not cases before that court, the court lacked personal jurisdiction over me in three of the four lawsuits in which it collectively sanctioned me under 28 U.S.C. § 1927. At the disciplinary hearing, I likened its action to an appellate court simply leafing through the phone book and randomly selecting names and addresses and issuing orders compelling the payment of money, or the transfer of real estate deeds, or of securities. I then narrowed the analogy to litigants selected randomly from a court's database, or to attorneys selected randomly from the roles of those authorized to practice before that court. I asked rhetorically whether an appellate court could simply slap a caption from a pending appeal onto a random order compelling the payment of money or the transfer of property to someone – perhaps the opposing party, perhaps someone else – utterly independent of any issue in the litigation bearing that caption, and thus acquire jurisdiction to issue the order. I argued that I would not, and citing, *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957), I said I believed the order would be void or at least collaterally challengeable. In support I referenced a comment by Justice Scalia writing for the court in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (although I did not state the name of the case, and identified the comment solely by its author) that a court's ruling on a matter in which the court had no jurisdiction to do so is, by definition, an *ultra vires* act. I reiterate those arguments.

The very concept of such a *judgment*, issued *sua sponte* and *ex parte* by an appellate court, is ridiculous; it's an *ultra*

vires act, and not just because of the utter absence of due process. A *sua sponte* judgment that requires the payment of money or the performance of (or the refraining from) a specific act is not a judgment *on a case or controversy before the court*, at least not a case or controversy between the *parties* in that case; thus courts lack Art. III subject matter jurisdiction to issue such judgments. No other court, in any other reported opinion (none that I've found after extensive research, anyway), has claimed such power for itself. And my research has disclosed no other reported case anywhere in the country in which a sanction of any kind has been imposed under a circumstance even remotely similar to that in my case. Nor is there any other reported case in which an appellate court recognized that it had imposed a *sua sponte, ex parte* sanction *in error* yet enforced the sanction nonetheless.

The court in its disbarment order confuses the *sue sponte, ex parte* sanction order with the order that resolved the appeal. The court also seems to confuse the defendants with itself. It treats the sanction order as though it were *the sanction* that was the subject of the litigation rather than a fabrication by the court out of the blue. But the *sanction order*, issued as it was *sua sponte* and without prior notice to *either* party, resolved no controversy whatsoever between the defendant and me. It mediated no right, no claim, no contest, as between us that we had brought to the court. The court thus fundamentally misrepresents the character of the order with which I refused to comply, and consequently the nature of my defiance of that court order, when it casually refers to the sanction order as a ruling that resolved the litigation.

That characterization and the court's offhanded depiction of me as a disappointed litigant unwilling to accept a litigation loss are sheer fancy, all the more so because I did not actually lose the litigation itself. As I note above, I refiled it in state court and it remains pending. The court's equating me with the 50% of litigants who lose in litigation on the issues presented by the litigation itself strikes me as something out of Never Never Land. I did not refuse to accept or comply with the resolution of the appeal; I did not try to refile the fee-

challenge case in federal district court in contravention of the resolution of the appeal itself. Instead I refiled it in state court, as was my right under Illinois law. The only order that I refused to accept and to comply with is unrelated to any issue presented by the parties to the litigation. And I claim that that order is void or collaterally voidable as an *ultra vires* order.

As the court's opinion reads, there is nothing to prevent a court from doing those things and from then issuing a contempt citation or initiating a disbarment proceeding for failure to comply. The court opinion holds outright, in a ruling that seems to me at a minimum contrary to the essence, if not the specifics, of *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), that the only procedural process due before a court issues a sanction derivative of an earlier order that compelled someone to do something is a hearing to determine whether the underlying order has been complied with; the utter absence of due process in issuing the underlying order is not a permissible defense to the derivative sanction. An appellate court may enter a judgment based upon, literally, nothing at all. Or so that court claims as a power that it possesses.

This statement of law accords appellate courts unbridled authority, not only to randomly select litigants or attorneys or (theoretically, because the court's opinion draws no line at all) anyone else for such treatment, but—worse, because it's far more likely—to *carefully* select litigants or attorneys for such treatment, on the basis of who they are, or whom they represent, or the *type* of cases they're associated with. It encompasses the authority to censor access to federal courts. Indeed the vitriol that court spews at me in its Aug. 31 order begins with a pronouncement that my lawsuit was absurd.

Judge Easterbrook has said outright that his court has the *ex parte* authority to invoke *sua sponte* defenses on behalf of civil defendants. This would appear to revoke the doctrines of issue forfeiture and waiver as applied to civil defendants and to revoke procedural due process as a matter of right pertaining to their opposing plaintiffs. See *Hampton v. Wyant*, 296 F.3d 560 (7th Cir. 2002). But the doctrine remains intact for use when wanted. ("[C]ourts normally do not force parties

to file particular defenses or claims; our reported cases are replete with examples of both claims and defenses that are waived." (See *Adkins v. Illinois Central R.R.*, 2003 U.S. App. LEXIS 3936 (7th Cir. 2003); "The plaintiff missed a better argument.... However, the argument has been waived, so both rulings that the plaintiff has appealed from are affirmed." *Stephan v. Goldinger*, 2003 U.S. App. LEXIS 6593 (7th Cir. 2003).)

Saying that "it is the sleepwalking judge, not the diligent one, who deprives the litigant of the personal right to careful, individual consideration," he mused that "[a]ny time a judge does independent research there is a risk of error, but judges with some initiative probably err at lower rates than judges who naively believe that the briefs cover everything worth considering." This removes any semblance of procedural due process and of the adversarial process. It is the very embodiment of judicial advocacy on behalf of a litigant, and thus of judicial partiality. But if an appellate judge opts to play that role, does he not then have the responsibly to actually *do* what Judge Easterbrook said is its justification for the sweeping mandate he claims? To *not* sleepwalk? To *be* diligent? To *not* deprive the litigant of the personal right to careful, individual consideration?

He acknowledged that the absence of any input by the plaintiff might lead to an erroneous result, but said the right to file a petition for rehearing and to file a certiorari petition suffice as due process. "These afforded ample opportunities to point out any errors in the appellate court's independent research," he wrote, apparently confusing ample opportunities to point out errors with ample opportunities to have those errors corrected. This Court, which now presets its argument at 78 cases per term, no longer functions as a reviewing court.

At the Oct. 16 disciplinary hearing, when I argued (as I do here) that a judgment entered in the absence of even basic procedural due process is void or at least collaterally voidable, Judge Easterbrook said the availability of the option to file a certiorari petition sufficed as due process. I replied that this Court does not operate as a reviewing court, that it operates

solely as a quasi-legislative body. I cited to *Overton v. Ohio*, 122 S. Ct. 389 (2001), a dissent by four justices to the refusal of this Court to summarily reverse a ruling of the Ohio Supreme Court that was in direct conflict with this Court's precedent, the sole basis for the Court's denial of the petition being that the Court does not operate as a reviewing court.

Judge Easterbrook did not dispute my characterization of this Court's function, yet he claims the apparition of this Court as due process. Nor is the right to file a petition for rehearing any more substantive that the right to file a certiorari petition. That court does not grant them. In response to my 17-page, single-spaced response to that court's Aug. 31, 2001 show-cause order—which served the function of a petition for rehearing—that court said I had acknowledged the *sua sponte* affirmative defenses as *valid* and pled only ignorance of them. Actually I had said I was ignorant of them but that they were *invalid*, and recited in detail why.

Earlier this year, in a case called *Hoskins v. Poelstra*, 320 F.3d 761 (7th Cir. 2003), Judge Easterbrook wrote in reversing the dismissal of a *pro se* complaint that "when exercising discretion to review complaints, judges must take care that initial impressions, and the lack of an adversarial presentation, not lead to precipitate action that backfires and increases the duration and cost of the case." Nice. He explains that the district judge's "eye was caught by the complaint's allegation that John Poelstra (a private citizen) conspired with the state actors to violate Hoskins's rights." Thus the precipitate action. Oh.

In my case, Judge Easterbrook's eye was caught by the convergence of a quadfecta of his fixations. He's obsessed with matters jurisdictional and state-comity-related, and has fetishized *Pennzoil* and *Rooker-Feldman* and invokes those doctrines with the fervor of a zealot. He rages against anyone who challenges (or seems to be challenging) the private financial costs of litigation vis-à-vis the costs to government of maintaining the civil justice system. He fumes at those who challenge the constitutionality of laws or public policies, because he believes in an almost pure democracy, in a system

by which the only check on legislative, executive and judicial power is the ballot box, in a system in which the judicial check on legislative and executive powers is cosmetic, and he imposes that belief. All jurisdiction is personal. All constitutional law is local.

He's given the term "frivolous lawsuit" a remarkably amorphous quality, so that any claim to which there exists a plausible affirmative defense or (as in my case) an affirmative defense that has no basis in law but that the appellate court asserts nonetheless on behalf of the defendants fits the definition. This loose definition renders meaningless any requisite finding of "frivolousness" before a sanction can be imposed.

The effect is to foreclose access to federal court as a forum in which to challenge the constitutionality of state or municipal laws. And because Illinois is a state in which the judiciary is compiled through a highly political process that entails the collection of large campaign donations and the nod of the political slate makers, the foreclosure of access to federal court effectively forecloses access to court in any challenge to government. (See, "Who knew? Key to becoming judge is who you know," *Chicago Sun-Times*, April 29, 2003 (App. L).) In Illinois, the same clout-heavy trade groups that monopolize access to the legislative and executive branches also monopolize access to the state's Supreme Court, and they alone may challenge the constitutionality of statutes and ordinances.

"Courts frequently decide cases on lines of reasoning that can not be found in the briefs," Judge Easterbrook said in *Hampton*. But when those lines of reasoning are entirely new defenses rather than a different line of reasoning in a defense that had been asserted, and the plaintiff learns of the defenses only when the appeal is decided on its basis, it violates the plaintiff's due process. And when a sanction is imposed in that manner that shifts the fee for the entire litigation, it most certainly does.

Anyone who doubts the value of due process, the value of input by a plaintiff against whom a *sua sponte* affirmative defense is asserted, need only read the transcript of oral

argument in *General Auto Service Station LLC v. City of Chicago*, 319 F.3d 902 (7th Cir. 2003) (App. H), and then read Judge Easterbrook's opinion (App. I), and compare them with the Aug. 31, 2001 order he wrote in my case. The case addresses the preclusive effect (none) under Illinois law of an Illinois judge's denial of a motion for intervener. Suffice it to say that there was no finding of unreasonable and vexatious multiplication of the litigation, and no fee-shifting sanction was imposed. The right to due process before important personal rights, obligations and penalties are permanently determined surely entails more substance than just the right to file petitions after the fact. Court citation to an anachronistic hierarchy of authority does not suffice either.

In my written response to the disbarment show-cause order I relied substantially upon *BE&K*. I agued that 28 U.S.C. §1927 as applied to me violated the First Amendment's right-to-petition clause because the lawsuit in which the sanction was imposed was neither objectively baseless nor was it filed and litigated in bad faith. In rejecting this argument, the court interpreted a sentence near the end of *BE&K* as extending the right-to-petition protection only to bar fee-shifting as a sanction imposed by administrative agencies. But the "objectively baseless" test of *BE&K* was adopted from *PREI*, an antitrust case litigated entirely in Art. III courts. I also noted the reiteration in *BE&K* that the Supreme Court earlier had "recognized this right to petition as one of the most precious of the liberties safe-guarded by the Bill of Rights." I said it was implausible that *BE&K* was intended to limit right-to-petition considerations to administrative law proceedings and antitrust litigation. What was at issue in *BE&K* was the circumstances under which the American Rule of fee-shifting can be abrogated. The NLRA Act is silent on that and therefore, *BE&K* says, it is presumed not to abrogate it; thus *PREI's* First Amendment "objectively baseless" test is applicable. But neither does the language of 28 U.S.C. §1927 abrogate the American Rule. To the contrary, that statute limits its authority expressly to unreasonable and vexatious litigation. I ask this Court to clarify whether, by that

referenced sentence, it intended to limit First Amendment right-to-petition considerations to administrative law proceedings and antitrust matters litigated in Art. III court.

I also refute as absurd the appellate court's suggestion that constitutional rights requisite to the imposition of a criminal or civil sanction accrue only if the substantive law allegedly is itself unconstitutional. (In this instance the right at issue was procedural due process, but presumably this rule, if it is one, also such rights as representation by counsel, the right against self-incrimination, and the right to be free of unreasonable searches and seizures) The court suggested as much in its discussion of the applicability of the holding in *BE&K Construction* to sanction imposed under 28 U.S.C. §1927; it appears to have held that I could not challenge the constitutionality of the sanction imposed against me as violative of the Fifth and First amendments because *BE&K Construction* indicated that fee-shifting-sanctions statutes such as §1927 were not in themselves unconstitutional.

But the holding of *BE&K Construction* was that the fee-shifting rule at issue there was *not* itself unconstitutional; it was the *sanction* issued in that case, not the fee-shifting rule invoked to issue the sanction, that violated the First Amendment because the sanction was imposed *absent a finding of fact* that comports with the First Amendment right to petition the government as described in *PREI*.

In my written response to the show-cause order, I relied also upon *Canatella v. State of California*, 293 F.3d 1099 (9th Cir. 2002), amended at 304 F.3d 843. In that case, an attorney challenged specific California disciplinary rules as unconstitutionally overbroad, although he had not been sanctioned under the rules He claimed that the overbreadth of the rules imposed a prior restraint on actively protected under the First Amendment. In reversing the dismissal of the case for lack of standing to bring it, the court relied upon *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973), and *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984), in finding that it did impose an unconstitutional prior restraint on the right to petition the government through the courts.

I also ask this Court in light of *BE&K* to vacate the Oct. 16, 2001, order that continues to bar my access to the federal courts within the 7th Circuit. (App. J). Like the order in *Agostini v. Felton*, 521 U.S. 203 (1997), the "*Mack*" order remains in effect; it continues to bar my access to the federal courts within the 7th Circuit. *BE&K* renders it now clearly inappropriate, both because it bars my access to the courts and because it was issued as a sanction for the failure to comply with a sanction order that itself violated the right to petition as stated in *BE&K*.

I challenge Federal Rule of Appellate Procedure 46(b)(1)(B) as unconstitutionally vague. In rejecting that argument the court relied upon *In re Bithoney,* 486 F.2d 319 (1st Cir. 1973), which, the court said is, as far as it can tell, the only opinion that considered a due process challenge to that Rule, and which held that it gives lawyers adequate notice. The court also relied upon *Parker v. Levy,* 417 U.S. 733 (1974), which considered a due process challenge to a somewhat comparable provision, Article 133, of the Uniform Code of Military Justice, found that that provision met due process standards. *Bithoney* and *Parker*, the court wrote, "observed that long traditions and compiled rules of the legal and military professions flesh out the elliptical 'conduct unbecoming' standard." The opinion in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), for the collateral-bar rule and Ill. R. Prof. Conduct § 8.4(a)(5) for the proposition that ("A lawyer shall not ... engage in conduct that is prejudicial to the administration of justice."). Both are offered as evidence that I knew I was expected to comply with the order. But that's not the issue here.

Spangler relied entirely upon the facts that the order that was defied resolved the issues that were orderly litigated between the parties, and that that order was a continuing injunction and thus there existed a mechanism by which to challenge its continued effect. In my case, by contrast, the order neither resolved issues between the parties nor resolved issues that were orderly litigated—or, for that matter, were litigated all. And there was never, much less is there now, a

mechanism by which I could challenge its propriety. And as for Ill. R. Prof. Conduct § 8.4(a)(5), the Illinois A.R.D.C. cleared me of violating exactly that provision; I wish to emphasize that. So, yes, I knew what was expected of me. But the question is whether in that instance I was bound by what was expected of me or whether instead, given the circumstance—which was that the two grounds for the ruling in *Spangler* were absent in my case —I was not.

As for the applicability of *Parker*, I quote the following from *Spargo v. New York State Commission on Judicial Conduct*, 1:02-CV-1320 NDNY (Feb. 20, 2003), citing *Parker*: "'One to whose conduct a statute clearly applies may not successfully challenge it for vagueness'. However, when the challenge is grounded in the First Amendment, there is an exception to this general principle that a facial challenge is precluded.16 Id." As *Spargo* notes, *Parker* "did not find, as defendants suggest, that in the context of a civilian, such as *Spargo*, the general rule (rather than the exception) applies."

Conclusion

This has been a Kafkaesque trip that began because I filed a civil rights lawsuit in federal court challenging the constitutionality of a state court-record-preparation-fee statute. Unless this court reverses the disbarment, I'll spend the rest of my life faced periodically with having to explain to some agency, to some opponent, to ... someone, why I was disbarred by a federal appellate court. No lawyer, and no litigant, should endure what I have and what I will if this Court denies this petition because she filed a non-frivolous lawsuit in compliance with applicable law and was never accorded the opportunity to say that when it might have mattered. The practice of law and the invocation of the right to use the courts in a civil proceeding should not be so perilous.

I also ask that this Court vacate the Oct, 16, 2001 order barring my access to the federal courts within the 7th Circuit.

Respectfully submitted,

Beverly Mann